IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DAVID BURNELL SMITH, a citizen and resident of the State of Arizona, Petitioner/Appellant, v. ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, an agency of the State of Arizona; STATE OF ARIZONA, a State of the United States of America; STATE OF ARIZONA ex rel. TERRY GODDARD, ARIZONA ATTORNEY GENERAL, Real Parties in Interest/Appellees.	1 CA-SA 05-0292**A** DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure) **FILED 1-19-2006**

Appeal from the Superior Court in Maricopa County

Cause No. CV 2005-093310

The Honorable Mark F. Aceto, Judge

AFFIRMED

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K E S S L E R, Presiding Judge

¶1 Petitioner/Appellant David Burnell Smith ("Smith") filed

a petition for special action seeking review of the superior court's December 8, 2005 signed minute entry ("Judgment"): (1) dismissing his claims against Real Parties in Interest/ Appellees Arizona Citizens Clean Elections Commission ("the Commission"), the State of Arizona, and the State of Arizona ex rel. Terry Goddard, Arizona Attorney General ("Attorney General") (collectively, "Appellees"); and (2) granting Appellees' petition quo warranto to remove Smith from his legislative office. Pursuant to the stipulation of the parties, this Court entered an order converting the special action petition into an accelerated appeal, ordering accelerated briefing and oral argument, staying the effect of the Judgment until five judicial days after this Court entered its decision on the merits, and agreeing to issue its decision on the merits on an expedited basis. Following such order, Smith moved to stay all further appellate proceedings, claiming he was entitled to legislative privilege from civil process under Article 4, Part 2, Section 6 of the Arizona Constitution(2001) ("Motion for Stay"). This Court ordered expedited briefing on the Motion for Stay and consolidated oral argument on that motion with the oral argument on the merits.

¶2 This Court has jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution (2001) and Arizona Revised Statutes ("A.R.S.") § 12-2101(B) (2003). For the following reasons, we deny the Motion for Stay and affirm the Judgment.

I. Issues Presented

¶3 Smith raises five issues on appeal:

1. Whether the entire appeal should be stayed or suspended pursuant to Article 4, Part 2, Section 6, of the Arizona Constitution until the adjournment of the 2006 legislative session.

2. Whether the Commission waived the provisions of A.R.S. §§ 16-940 et seq., the Citizens Clean Election Act (Supp. 2005) ("the Act") and specifically A.R.S. § 16-957(B), that required Smith to seek judicial review of the Commission's final agency decision of October 4, 2005 ("October 4 Order") within fourteen days. Smith contends that such waiver effectively extended the time for him to seek judicial review of the October 4 Order to thirty-five days pursuant to A.R.S. §§ 12-901, et seq. (2003) (the Administrative Review Act or "ARA"), and specifically A.R.S. § 12-904(A);

3. Whether Smith's original complaint for judicial review filed on September 26, 2005, was an actionable premature appeal that automatically became effective upon the filing of the Commission's October 4 Order and was subject to amendment within thirty-five days of that order.

4. Whether the superior court erred in dismissing Smith's claims for declaratory relief challenging the constitutionality of the Act and the Commission's proceedings against him.

5. Whether Smith had a right to a jury trial on the petition for writ of quo warranto.

II. Procedural History

¶4 Smith successfully ran for a seat in the Arizona Legislature in 2004, having taken funds under the Act for his campaign. On March 25, 2005, the Commission issued a preliminary order ("March 25 Order") finding Smith had violated the Act and in part, should be required to vacate his seat in the legislature. In that order, the Commission informed Smith he could appeal the March 25 Order pursuant to A.R.S. § 41-1092 of the Arizona Administrative Procedures Act, A.R.S. §§ 41-1092 et seq. (2004 and Supp. 2005) ("APA"). Smith filed such an appeal by requesting and receiving evidentiary hearings before an administrative law judge. On August 22, 2005, that administrative law judge issued a recommendation ("August 22 recommendation") finding the March 25 Order was correct. On August 25, 2005, the Commission issued its order ("August 25 Order") adopting the August 22 recommendation and confirming the March 25 Order. In the August 25 Order, the Commission informed Smith he could seek a petition for rehearing before the Commission or seek judicial review under A.R.S. § 16-957(B). On September 23, Smith filed a petition for rehearing.

¶5 However, on September 26, 2005, Smith also filed a complaint in the superior court seeking special action relief, judicial review of the March 25 Order and the August 22 recommendation,[1] and seeking declaratory relief that the Act and

[1] Smith did not seek review of the August 25 Order. However, he did ask the court to review "all other administrative decisions made or entered in support of" the March 25 Order and the

the Commission's proceedings against him were unconstitutional. After the Commission denied the petition for rehearing in its October 4 Order, Smith waited until October 28 to file an amended complaint in the superior court. In that amended complaint, he sought the same relief as his earlier complaint, but also asked for judicial review of the March 25 Order, August 22 recommendation, August 25 Order and the October 4 Order.

¶6 The Appellees moved to dismiss Smith's complaints. After the fourteen day period from the issuance of the October 4 order expired, the State filed its petition for a writ of quo warranto to remove Smith from his legislative office on the basis of the final Commission decision. Smith answered the petition admitting the actions of the Commission, but challenging the Commission's decisions. He also moved to dismiss the petition for quo warranto and requested a jury trial on the quo warranto petition. In its Judgment, the superior court dismissed Smith's complaints and granted the petition for quo warranto, but stayed its order until December 20, 2005.

¶7 Smith filed a special action in this Court and also requested this Court to stay the Judgment pending its ruling on the special action. As noted above, pursuant to the stipulation of the parties, this Court entered its December 20 order converting the special action to an accelerated appeal, expedited briefing and oral argument and stayed the Judgment until five judicial days

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August 22 recommendation.

after any ruling on the merits of the appeal. On December 29, Smith filed his Motion for Stay, asserting the legislative privilege.

III. Issue 1 - Motion for Stay

¶8 Smith contends he is privileged from further civil process from December 27, 2005 until the end of the 2006 session of the Arizona Legislature pursuant to Article 4, Part 2, Section 6, of the Arizona Constitution. That section provides "Members of the Legislature shall . . . not be subject to any civil process during the session of the Legislature, nor for fifteen days next before the commencement of each session." Smith filed the Motion for Stay after he invoked the jurisdiction of this Court to: hear the appeal, stay the Judgment until a decision on the merits, and decide the merits on an expedited basis.

¶9 The State opposes the Motion for Stay contending that Smith waived or is estopped from asserting any such constitutional privilege. It also contends that such a privilege may not be raised for the first time on appeal and does not relate to the prosecution of an appeal, but merely to such matters as the service of process of a complaint or notices of deposition.

¶10 Smith has failed to cite, and our independent research has failed to find, any authority that "civil process" includes appellate proceedings from a judgment entered before the privilege allegedly attached. Neither the Arizona Constitution nor Arizona statutes define the term "civil process" in this context. Thus, we

must attempt to determine its meaning in light of the history behind its enactment, the purpose sought to be accomplished and the evil sought to be remedied. *Ruth v. Indus. Comm'n.*, 107 Ariz. 572, 575, 490 P.2d 828, 831 (1971).

¶11 Cases dealing with this type of legislative privilege address "civil process" in the form of a subpoena or summons prior to a trial court judgment, not an appeal taken by a legislator from a judgment entered before the time set for the privilege. *State v. Beno*, 341 N.W.2d 668, 671 (Wis. 1984) (service of subpoena); *Harmer v. Superior Court*, 275 Cal. App. 2d 345, 347 (1969) (service of summons); *Fuller v. Barton*, 208 N.W. 696, 697 (Mich. 1926) (service of garnishee process which would require legislator to appear and defend against writ of garnishment). The rationale for the legislative privilege is to prevent a legislator from having to take the time to personally appear to defend at trial or give testimony, which in turn would distract the legislator from the public interest while the legislature is in session. *Beno*, 341 N.W.2d at 676.

¶12 Alternatively, Arizona courts have interpreted civil process as that type of court order which would involve the seizure of the party or compel the party to comply with that order. *Yuma Greyhound Park, Inc. v. Hardy*, 106 Ariz. 178, 179, 472 P.2d 48 (1970) (legislative privilege from arrest arose from historical procedure where "civil process" involved the arrest of the legislator; as such, alleged Congressional immunity from process

did not apply to a Rule 37(a) order to give testimony at deposition); *State v. Surety Ins. Co.*, 127 Ariz. 493, 495 (App. 1980) (in context of appearance bond, "process" refers to a written instrument issued or under authority of the court so that defendant is making himself answerable or accountable to such order); *McCollum v. Superior Court*, 121 Ariz. 119, 120, 588 P.2d 861, 862 (App. 1978) ("process" is the means whereby a court compels compliance with its demands such as a subpoena).

¶13 An appeal to this Court fits into neither of the above concepts. The appeal in this case does not involve a service of a summons or subpoena requiring Smith to attend and give evidence or obey an order of the Court. It is merely a review of the judgment below. Nor does the appeal or any decision of this Court involve an arrest or seizure of Smith's person. Nor does Smith need to attend any of the proceedings before this Court to give testimony or prepare a defense.

¶14 In addition, the historical context of the constitutional provision for legislative privilege does not support a reading of civil process to include proceedings beyond the initiation of a lawsuit. The framers were aware of constitutional and statutory provisions that explicitly expanded the scope of legislative privilege to mandate a stay of all civil proceedings. *See Pittinger v. Marshall*, 40 S.E. 342, 343 (W. Va. 1901) (citing state code mandating "no trial shall be had or judgment rendered in any such suit, nor shall any execution or attachment be levied upon the

property of such member during the sessions of the legislature"); *Botts v. Tabb*, 10 Leigh 616 (Va. 1840) (recognizing provision in state code for legislative immunity requiring "process in which they are parties shall be suspended without abatement or discontinuance"); *Tillinghast & Arthur v. Carr*, 15 S.C.L. 152 (S.C. App. 1827) (recognizing constitutional legislative immunity provision stating "the members of both houses shall be protected in their persons and estates during their attendance on, going to and from the legislature"); *King v. Coit*, 4 Day 129 (Conn. 1810) (citing statute providing "[t]hat no member [of the general court] during the sessions thereof, or in going to or from the said court, be arrested, sued, or imprisoned, or any ways molested, or troubled, or compelled to answer to any suit, bill, plaint, declaration, or otherwise, before any other court, judge, or justice, cases of high treason and felony excepted."). That the framers chose to allow legislative privilege for "any civil process," but not "any civil proceedings," or "any civil suit" indicates they intended the privilege to extend to any process to initiate proceedings, but not any proceedings already taking place.

¶15 We also note that once a party has requested relief from a court, it may not then assert the legislative privilege to keep the relief in place during the legislative session or to object to an adverse decision based on the privilege. In *Botts,* a legislator obtained injunctive relief relating to his or her property prior to the time covered by a constitutional privilege from process. The

court held the legislator could not then assert the privilege to prevent the court from hearing motions for relief from that injunction because the motion was filed while the legislature was in session. In *Tucker v. Lake View School District*, 906 S.W.2d 295, 296 (Ark. 1995), an attorney who was a legislator signed a motion for attorney's fees for his client during the period of a statutory legislative privilege requiring a stay of litigation while the legislature is in session. When the court denied that motion, the attorney objected to the order, apparently asserting the privilege. 906 S.W.2d at 296. The Arkansas Supreme Court rejected application of the privilege, stating the legislator

> [C]annot participate in the litigation during the period of the stay, receive an adverse decision, and then urge that the matter was stayed and seek a second hearing on the matters previously resolved. This would place the opposing party in a dilemma, not knowing whether the matter was stayed or ongoing during a legislative session. If a legislator is to avail himself or herself of [the privilege], participation in the litigation pending the stayed period should not transpire.

Id.

¶16 Here, prior to December 27, Smith claimed the right to bring an independent action in the superior court for declaratory relief. He also requested this Court to convert his special action to an appeal, expedite the appellate process and decision and continue the stay of the Judgment beyond its then expiration date of December 20. After we granted their stipulation, converted the special action into an expedited appeal, agreed to decide the

merits of the appeal in January 2006 and further stayed the Judgment, Smith filed his new Motion for Stay based on the legislative privilege. The record also reflects that Smith participated in the litigation below during the past legislative session by filing a request for an evidentiary hearing before the administrative law judge and participating in settlement conferences in March and April 2005. The 2005 Legislature adjourned on May 13, 2005. Such conduct prevents Smith from now successfully asserting the privilege whether under the theory of waiver, equitable estoppel, quasi-estoppel or judicial estoppel.

¶17 To the extent Smith contends he did not waive the privilege because he asserted it at the earliest time possible, December 27, he incorrectly premises this argument on when he first asserted the privilege.[2] The key factor is that he stipulated with the State and requested this Court to issue a temporary stay until we could rule on the merits of his appeal during the 2006 legislative session. This stipulation constitutes waiver of his legislative privilege. *See City of Tucson v. Koerber*, 82 Ariz.

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[2] Smith also contended that the privilege could not be waived. That is legally incorrect. *See Gravel v. United States*, 408 U.S. 606, 622, n.13 (1972) (protection under speech and debate clause waivable); *Arizona Indep. Redistricting Comm'n. v. Fields*, 206 Ariz. 130, 144, ¶ 48, 75 P.3d 1088, 1102 (App. 2004) (holder of legislative evidentiary and testimonial privilege can waive privilege, *citing to Gravel*); *National Ass'n of Social Workers v. Harwood*, 69 F.3d 622, 638 (1st Cir. 1995) (waiver of legislative privilege found when not asserted in trial court by legislator who was attorney and who was represented by able counsel). In any event, whether the privilege is waivable has no effect on whether Smith can be estopped from asserting the privilege.

347, 356, 313 P.2d 411, 418 (1957) (waiver is shown by such conduct that warrants relinquishment of a known right). If Smith did not want to waive the privilege, the key is not when he first asserted it, but that he agreed to have this Court rule on the merits of his appeal during January 2006.

¶18 In addition, all of the elements of estoppel are present here.) "Estoppel is quite generally predicated on conduct which induces another to acquiesce in a transaction, and that other, in reliance thereon, alters his position to his prejudice." *Holmes v. Graves*, 83 Ariz. 174, 177, 318 P.2d 354, 356 (1957). After the State stipulated with Smith and this Court agreed to a stay of the superior court's orders in reliance upon the stipulated timeline, Smith asserted the constitutional privilege. Accordingly, he is estopped from asserting legislative privilege in order to halt these proceedings.[3]

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[3] Moreover, Smith waited until after December 27 to inform this Court that, despite requesting and obtaining relief in the form of an extended stay and for an expedited disposition of the appeal during the legislative session, he was going to assert the legislative privilege. Regardless of any argument of the parties, such conduct judicially estops Smith from now asserting the privilege, a fact we can act on in our inherent power. *Montrose Med. Group Participating Sav. Plan v. Bulger*, 243 F.3d 773, 779-80 (3rd Cir. 2001); *Bank of America v. Maricopa County*, 196 Ariz. 173, 175-76, ¶¶ 7-8, 993 P.2d 1137, 1139-40 (App. 1999). All of the elements of judicial estoppel are present here. Smith took the position that this Court could and should determine the merits of the appeal during the legislative session and sought and obtained a stay from December 20 until after December 27, all of which is irreconcilably inconsistent with his current position. He also failed to inform this Court that he would be contending it lacked authority to decide this case on appeal after December 27 when he asked this Court to rule on the merits during January 2006.
(continued...)

¶19 Given the authorities cited and the timing of Smith's motion, on this record a stay based on the legislative privilege should not be applied. Accordingly, we deny the Motion for Stay.

IV. Issue Two - Waiver of the Fourteen Day Requirement of A.R.S. § 12-957(B).

¶20 Smith contends that by its March 25 Order referencing his right to appeal pursuant to section 41-1092 of the APA, the Commission gave him rights under the APA that he did not otherwise have and thereby waived the requirement of A.R.S. § 16-957(B) that he appeal a final order of the Commission within fourteen days of its issuance. Smith contends the March 25 order permitted him to appeal any interlocutory and final administrative order of the Commission within 35 days of its service as provided by A.R.S. § 12-904(A). We disagree.

¶21 First, we hold the time to appeal from a final administrative agency order is jurisdictional in nature and thus cannot be waived. *Guminski v. Arizona State Veterinary Med. Examining Bd.*, 201 Ariz. 180, 182, ¶ 8, 33 P.3d 514, 516 (App.

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[3] (...continued)
Application of judicial estoppel is tailored to address the affront to this Court's authority or integrity. *Id.* The fact the inconsistent positions did not occur in separate proceedings should not matter since Smith cannot be said to have been pleading in the alternative, but rather taking inconsistent positions after achieving a sought-after benefit based on his stipulation.

Alternatively, even if such conduct was not estoppel or judicial estoppel, it amounts to quasi-estoppel. *Sailes v. Jones*, 17 Ariz. App. 593, 597, 499 P.2d 721, 725 (1972).

2001); *Arizona Dep't of Econ. Sec. v. Holland*, 120 Ariz. 371, 371-72, 586 P.2d 216, 216-17 (App. 1978) (time to file appeal from administrative agency decision cannot be waived because "compliance with the statutory requirement as to appeal time is a jurisdictional prerequisite to judicial review of an administrative decision."). As Appellees point out, the Commission does not have the authority to waive the court's jurisdiction.[4] *Guminski,* 201 Ariz. at 184, ¶ 18, 33 P.3d at 518; *Holland*, 120 Ariz. at 371-72, 586 P.2d at 216-17. Accordingly, the Commission could not waive the statutory fourteen-day jurisdictional time limit.

¶22 Second, even if the Commission could arguably waive the fourteen-day appeal requirement, it did not. The Commission's March 25 Order did not expressly or impliedly waive the requirement of A.R.S. § 12-957(B) by referencing the right to further administrative appeals pursuant to the APA. Rather, the March 25 Order merely confirmed what already existed as a matter of law, that the Commission's decisions were governed by the APA, including the right to judicial review of its final agency decision pursuant to the ARA and the Act. A.R.S. §§ 41-1001, -1002(A), -1005, and -1092(5), and 12-901(2) and -902(A)(1).

¶23 Smith's argument confuses the APA and the ARA. A party has rights to appeal administrative decisions under the APA to have

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[4] Smith asserts this argument is subject to estoppel given the Commission's acts waiving the deadline. However, that argument must fail because we find that the Commission's orders never waived the 14-day deadline.

evidentiary hearings in the form of contested cases. A.R.S. § 41-1092.03(B). The APA does not provide for any judicial review of interlocutory agency decisions and merely states that the final agency decision is subject to judicial review under the ARA. It is the ARA that provides for judicial review of final agency decisions. *Cf. Arizona Comm'n of Agric. & Horticulture v. Jones*, 91 Ariz. 183, 187, 370 P.2d 665, 668 (1962) (ARA provides for judicial review of final agency decisions). Accordingly, a statement that Smith had the right to appeal the March 25 Order under the APA could not be affecting a right to judicial review of a final agency decision under the ARA when the final agency decision had not yet been made.

V. Issue Three - Premature Appeal

¶24 Smith argues that, even if the Commission did not waive the fourteen-day jurisdictional requirement to seek judicial review of the October 4 Order, his September 26 complaint was merely a premature appeal that became effective automatically upon issuance of the October 4 Order. He further argues, given that premise, his amended complaint related back to the original complaint. We disagree and hold Smith's complaints for judicial review of the Commission's orders were jurisdictionally defective.

¶25 As noted above, a complaint for judicial review of an agency decision is an appeal, not a complaint for relief in the first instance in the superior court. *Guminski*, 201 Ariz. at 182, 8, 33 P.3d at 516. As such, the statutory time to appeal is a

jurisdictional requirement which "must be strictly complied with to achieve entrance to appellate review." *Holland*, 120 Ariz. at 373, 586 P.2d at 217. *Accord Jones*, 91 Ariz. at 187, 370 P.2d at 668 (right of appeal from final agency decision exists only by force of statute and right is limited by statute). When a party fails to file a timely appeal from the agency's final decision, it "deprive[s] that court of jurisdiction to review the decision . . . ." *Holland,* 120 Ariz. at 372, 586 P.2d at 216.

¶26 Pursuant to A.R.S. §§ 12-901(2), 12-902(A)(1), 16-957(B), and 41-1092(5), the Legislature expressly required that, to seek judicial review, a party must comply with those statutes. This included the jurisdictional requirement that an appeal be filed within fourteen days of issuance of the Commission's final administrative order of October 4.

¶27 Section 12-902(B) is very plain in its language. There, the Legislature stated that, "[u]nless review is sought of an administrative decision within the time and in the manner provided in this article, the parties to the proceeding before the administrative agency *shall be barred* from obtaining judicial review of the decision." A.R.S. § 112-902(B)(Emphasis supplied). The only relevant exception to that requirement is found in section 12-902(A)(1), which provides that the ARA governs the process of judicial review of a final agency decision unless "the act creating . . . an agency or a separate act provides for judicial review of the agency decisions and prescribes a definite procedure for the

review." That language should be read in pari materia with the Act since the APA, the ARA and the Act all deal with the process of review of the Commission's decisions. *Rose v. Arizona Dep't of Corr.*, 167 Ariz. 116, 119, 804 P.2d 845, 848 (App. 1991) (APA and ARA should be construed in pari materia). Such an exception is found in A.R.S. § 16-957(B), which limits the time to review a final decision of the Commission to fourteen days after it is issued.

¶28 In construing and applying the language of a statute, we are bound by its plain meaning. *US West Communications, Inc. v. City of Tucson*, 198 Ariz. 515, 520, ¶ 12, 11 P.3d 1054, 1059 (App. 2000). These statutes and time deadlines are jurisdictional in nature and any appeal must abide by their requirements or it is barred. *Holland*, 120 Ariz. at 371-72, 586 P.2d at 216-17. The language of the above statutes could not be more plain. Smith had only fourteen days from October 4 to seek judicial review of that decision or he would be "barred" from seeking such review.

¶29 Smith has pointed us to no case providing that, absent an express statute or regulation, a party in an agency proceeding can file an appeal from a substantively interlocutory order of that agency and have that premature appeal automatically become effective upon issuance of a substantively appealable final order. Neither has Smith pointed to any authority which would permit this Court to create an exception to this jurisdictional statute based on a concept of a premature appeal. For this Court to engraft a

judicial exception to the plain meaning of the statute imposing a jurisdictional requirement for judicial review would be to substitute our judgment for that of the Legislature. That we cannot do.

¶30 Instead, Smith and the dissent contend that a premature appeal from a judgment issued by a trial court can be considered automatically effective once the judgment becomes appealable. In fact, Arizona and federal law are exactly to the contrary; a premature appeal from an interlocutory order does not automatically become effective once the judgment is entered. *Baumann v. Tuton*, 180 Ariz. 370, 372, 884 P.2d 256, 258 (App. 1994); *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 276 (1991). *See also Navajo Nation v. MacDonald*, 180 Ariz. 539, 547, 885 P.2d 1104, 1112 (App. 1994) (when appellant filed notice of appeal, then filed Rule 60 motion in trial court, but did not file new notice of appeal after trial court denied Rule 60 motion, appellate court lacked jurisdiction over appeal from Rule 60 order). The same rule applies to appeals from agency decisions. *Clifton Power Corp. v. Federal Energy Regulation Comm'n*, 294 F.3d 108, 110 (D.C. Cir. 2002) (premature appeal from agency decision filed while rehearing request was pending was not effective even though agency shortly thereafter denied rehearing).

¶31 Arizona law on allowing premature appeals to become effective is much more limited. It provides that, when a substantively appealable order has been issued but lacks a

ministerial requirement to be effective, such as not being signed, a premature appeal from such a defective order becomes effective immediately upon the signed judgment without further action needed by the appellant. *Barassi v. Matison*, 130 Ariz. 418, 419-22, 636 P.2d 1200, 1201-04 (1981). However, as the Arizona Supreme Court stated in that case, "[i]t should be noted that the Arizona Appellate Courts will dismiss for lack of jurisdiction the case where a litigant attempts to appeal where a motion is still pending in the trial court or where there has been no final judgment." *Id.* at 422, 636 P.2d at 1204.[5]

¶32 One of the primary reasons for the distinction between substantively nonappealable orders and ministerially defective appealable orders is to avoid interruption of the decision-making process in the lower court or agency by interlocutory appeals or having two courts having the same proceedings before it at the same time. *Clifton Power Corp.*, 294 F.3d at 110. Therefore, courts are constrained from accepting premature appeals of agency decisions

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[5] Smith relies on *Performance Funding, LLC v. Barcon Corp*, 197 Ariz. 286, 289, ¶ 12, 3 P.3d 1206, 1209 (App. 2000), to argue that the above-quoted language of *Barassi* is mere dictum. While this Court characterized the above-quoted language from *Barassi* as dictum, Smith ignores that *Performance Funding* involved an *appellant* who filed a notice of appeal while the *appellee*'s tolling motion was pending. In addition, that was not a case dealing with an appeal from a substantively nonappealable order. The order appealed from was a final order. *Id.* at 288 n.3, 3 P.3d at 1208 n. 3. Finally, and most important for our analysis, the time to appeal from the judgment in that case was set by judicial rule, not by statute. Thus, allowing the appeal did not raise any issues of the court attempting to rewrite the legislature's requirements for a timely appeal.

not only by the limits placed on their jurisdiction by the legislature, but also by the principle of judicial restraint to avoid intrusion into the functions of the executive branch of government. Filing a notice of appeal before the Commission issued a final appealable order is not merely a hypertechnical, harmless error, as Smith contends. The lack of a final appealable agency decision is a profound jurisdictional defect, hearkening to the very foundations of Arizona's tripartite republican form of government.

¶33 The March 25 Order and the August 22 recommendation were not subject to judicial review because they were not final decisions of the Commission. The August 25 order was not substantively appealable once Smith moved for rehearing before the Commission on September 23, 2005. Thus, his September 26 complaint for judicial review was not simply premature, it was a nullity. *Baumann*, 180 Ariz. at 373, 884 P.2d at 259 ("the notice of appeal . . . filed while the motion for new trial was still pending . . . was a nullity . . . ."); [6] *Navajo Nation*, 180 Ariz. at 547, 885 P.2d at 1112 (notice of appeal filed while Rule 60 motion was still

[6] The dissent characterizes the complaint as not being a nullity because as of October 4 the Superior Court had not dismissed the complaint. No authority is cited to support the contention that whether a pleading is a nullity or merely voidable depends on whether the court has already dismissed it. Indeed, such an argument misapprehends how the Superior Court deals with complaints. A complaint may be filed and be jurisdictionally defective. However, a judge may not dismiss the complaint for months unless a motion is made and ruled on. Whether the complaint is jurisdictionally defective has to be based on the statutes conferring jurisdiction, not whether the court has had a chance to dismiss it.

pending did not confer jurisdiction on appellate court to review later order on Rule 60 motion).

¶34 Smith and the dissent contend that Smith's "premature" appeal from a substantively unappealable order really would not have affected the decision-making process of the Commission because it was taken only days after the August 25 Order was issued and only shortly before the October 4 Order was entered. The problem with that argument is neither Smith nor the dissent can draw a line as to when any such judicially-created exception to the rule prohibiting appeal from substantively nonappealable orders would end. Thus, under Smith's view, if an agency or a court entered a clearly nonappealable order issued in the middle of the proceedings, the party could immediately seek judicial review of that order by filing a complaint with the superior court under the ARA, or could seek appellate review with this Court. That complaint could interrupt the entire course of the proceeding, making agency or trial court decision-making impractical, if not impossible. By limiting appeals to substantively appealable orders, there is no interruption of that process and the party can seek review of any interlocutory orders as part of his or her complaint for judicial or appellate review of the final agency or trial court order.

¶35 Our conclusion on this ground is consistent not only with Arizona law but the law of other jurisdictions. *Buroff v. Bd. of Fire and Police Comm'r*, 618 N.E.2d 930, 933 (Ill. App. 1993)

(appellant who filed premature complaint for agency review must refile complaint for judicial review after agency decision becomes final); *Bagby v. Oregon St. Penitentiary*, 847 P.2d 898, 900 (Or. App. 1993) ("The filing of a premature petition for judicial review does not relieve petitioner of need to file a new petition after the agency decision becomes final . . . ."); *Pernalski v. Illinois Racing Bd.*, 692 N.E.2d 773, 779 (Ill. App. 1998) (fact that agency order became final eight days after appellant's complaint for administrative review was filed did not retroactively confer jurisdiction on the court).

¶36 This is not to say that Smith could not have remedied this jurisdictional defect. It is at least arguable that, had he filed his amended complaint for judicial review within fourteen days of October 4, that amended complaint could be seen as a timely appeal from the October 4 Order and all interlocutory orders that led to the October 4 Order. However, we need not address that issue because Smith did not seek to file his first amended complaint until October 28, 2005, more than fourteen days after the issuance of the October 4 Order. Accordingly, the first amended complaint was untimely.[7]

¶37 To avoid this result, Smith contends his first amended complaint related back to his original complaint filed on

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[7] Smith offered no explanation why he could not or did not file his first amended complaint within fourteen days of issuance of the October 4 Order other than to argue he thought he had thirty-five days to file under the APA based on this theory of waiver. As noted above, we reject that waiver theory.

September 26, and thus was timely. This is merely recharacterizing his argument that the September 26 complaint was a premature appeal. Since a complaint for judicial review of an agency decision is an appeal under Arizona law and not an original complaint for relief with the superior court, a premature filing of such an appeal from a substantively nonappealable order is a nullity and the relation-back doctrine under Ariz. R. Civ. P. 15(c) does not apply. In conclusion, Smith's original complaint was jurisdictionally defective and was not cured by the entry of the October 4 order or the amended complaint.

¶38 It appears the dissent views this issue as one of procedure. Under that paradigm, Smith's error is one of timing that is excusable because Smith evinced intent to appeal and effected substantial compliance with the steps necessary to appeal, and the State was aware of Smith's intent to appeal. Our understanding of the issue differs at the fundamental conceptual level. The defect in this case is not Smith's own error as to the timing of the filing of his complaint for judicial review. The defect is the absence of a final agency order at the time the complaint was filed. By statute, this defect divests the superior court of jurisdiction over the controversy. Similarly, by statute, jurisdiction over the controversy remained with the Commission. Neither Smith nor the dissent have provided any authority to support their contention that a complaint for review of a substantively non-appealable agency order may automatically "ripen" upon a final adverse agency order. Likely, this is because the

parties' actions do not create jurisdiction. Such jurisdiction is conferred upon the judiciary through statute, and must exist when the complaint is filed.

¶39 Attempting to craft a judicial exception to the statutes would not only violate principles of separation of powers. In addition, taken to its logical extension, the dissent's approach would wreak havoc on administrative agency enforcement actions. Under the dissent's theory a party may file interlocutory complaints for judicial review of non-final agency decisions instead of consolidating all assignments of error into one complaint for review of the final agency order. Those complaints would repeatedly force the agency to file answers in the superior court, and presumably transfer agency records to that court, while the agency proceedings were continuing. Notably, in the appellate context, such review is only available through special action jurisdiction, which is authorized by A.R.S. § 12-120.21(A)(4) (2003). No such provision exists within the APA or the ARA.

¶40 In sum, the resolution of this issue depends not upon the actions, intent, or knowledge of either party, but upon which tribunal is authorized by law to pass upon the controversy. We are bound by the statutes directing how the controversy should proceed between branches of government, rather than procedural rules, which direct parties' conduct as they litigate through the levels of the judiciary. We do not have the freedom to apply judicially-created

exceptions to these statutes, as we do with rules of procedure promulgated by the supreme court.[8]

¶41 Rather, we are bound by the plain language of the statutes. As a result, we cannot graft the logic of *Barassi*, *Performance Funding* and the other cases cited by the dissent and dealing with interpretation of court rules onto the statutory

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[8] The dissent also analogizes to rules of federal appellate procedure. Such an analogy fails on two levels. First, as explained above, there is a difference between having courts modify rules of procedure governing when an appeal from a trial court to an appellate court is considered timely and when courts attempt to craft such an exception on a jurisdictional statute. Thus, the federal rules, ultimately subject to Congressional approval, permit an appeal from a final, appealable judgment to ripen automatically once a tolling motion is disposed of. Fed. R. App. P. 4(a)(4)(b)(i). That amendment to the rules, however, governed the timing of appeals from one court to another, not a statute setting forth specific jurisdictional times to appeal. To complete the analogy, this Court would have to say that it could graft an exception to a statutory jurisdictional statute such as A.R.S. § 12-2101.

Second, the analogy ignores the full extent of the federal rule. The federal rules provide that, while a tolling motion, such as a motion for new trial is pending, an appeal filed after announcement or entry of a judgment but before an order disposing of such motion is deemed effective to appeal the judgment as of the date the latter order is entered. Fed. R. App. P. 4(a)(4)(B)(i). However, Fed. R. App. P. 4(a)(4)(B)(ii) then requires that: "A party intending to challenge an order disposing of any [tolling motion] . . . must file a notice of appeal, or an amended notice of appeal . . . within the time prescribed by this Rule measured from the entry of the order disposing of [the tolling motion]." And, of course, under the APA and the ARA, *only* the October 4 Order denying rehearing was the final order subject to appeal. Thus, even if we analogized to the federal appellate rules, if Smith wanted to appeal from an appealable order, once he requested rehearing the *only* appealable order was the October 4 Order. To appeal from that order, he would have had to file a timely amended complaint within fourteen days of that order. Similarly, Fed. R. App. P. 4(a)(4)(B) does not apply to appeals taken from other nonappealable orders. *FirsTier*, 498 U.S. at 276.

schema of the APA and the ARA. Given that agency review involves the transfer of the authority to decide a controversy from the executive branch of the government to the judicial branch, it is absolutely necessary that the means of transfer is dictated by the legislative branch through statute, rather than by the judicial branch through procedural rules and exceptions. In conclusion, Smith's September 26, 2005 complaint did not automatically become effective upon issuance of the October 4 Order and Smith's first amended complaint could not relate back to the September 26 complaint.

VI. Issue Four - Declaratory Relief

¶42 Smith contends that, even if his complaint for judicial review of the Commission's October 4 Order was not effective, his original and amended complaints sought declaratory relief challenging the Act and the Commission's proceedings under the Act on constitutional grounds, independent of review of the Agency's decision against him. Thus, the argument goes, those claims were not subject to the untimeliness argument relating to judicial review under the Act and the ARA. We disagree for several reasons.

¶43 First, Smith's argument is really an effort to avoid his failure to file an effective appeal for judicial review as required by statute. A party can seek to challenge a statute or proceedings before an agency on constitutional grounds in the form of an ARA appeal for judicial review of the agency's decision. *Hurst v. Bisbee Unified School Dist. No. 2*, 125 Ariz. 72, 75, 607 P.2d 391,

394 (App. 1980). *See also Arizona Bd. of Regents v. Harper*, 108 Ariz. 223, 229, 495 P.2d 453, 459 (1972) (judicial review from administrative agency final decision must be made by appeal under ARA and not by a complaint for declaratory relief); *Wooten v. City of Atlanta*, 254 S.E.2d 889, 890-91 (Ga. App. 1979) (party precluded from bringing declaratory judgment action challenging constitutionality of statute during course of administrative hearing; such claim must be raised on judicial review of final agency decision as provided under state law by writ of certiorari); *City of Atlanta v. Lopert Pictures Corp.*, 122 S.E.2d 916, 919-20 (Ga. 1961) (same). However, under those same cases as well as others, the person cannot seek to use a complaint for declaratory relief as a substitute for a complaint for judicial review of the Commission's orders. *Hurst,* 125 Ariz. at 75, 607 P.2d at 394 (challenge on violation of procedural due process); *Schierding v. Missouri Dental Bd.*, 705 S.W.2d 484 (Mo. App. 1985) (attack on facial constitutionality of statute must be made in request for judicial review of agency decision or it will constitute collateral attack on agency decision); *Larry Pitt & Assoc., P.C. v. Butler,* 785 A.2d 1092, 1101 (Pa. Cmnwlth. 2001), *affirmed*, 811 A.2d 974 (Pa. 2002) (same); *Wooten*, 254 S.E.2d at 890-91 (party to agency proceeding cannot bring declaratory judgment action to challenge statute agency is proceeding under but must await final agency decision and then seek writ of certiorari from agency decision); *City of Atlanta*, 122 S.E.2d at 919-20 (same); *State Personnel Bd.*

v. Dist. Ct., 637 P.2d 333, 337 (Colo. 1981) (trial court lacked jurisdiction to consider facial constitutional challenge to employment board statute except through judicial review of board's final decision). *See also Land Dep't v. O'Toole*, 154 Ariz. 43, 47, 739 P.2d 1360, 1364 (App. 1987) ("The declaratory judgment procedure is not designed to further an additional remedy where an adequate one exists.").

¶44 By simply labeling his request for declaratory relief as independent from his request for judicial review, Smith attempts to circumvent the ARA and the Act by placing form over substance. Smith's constitutional claims could and should have been raised in a timely request for judicial review under the ARA and the Act, not treated as a separate and independent claim for declaratory relief. An appeal for judicial review was thus an effective and adequate remedy except for Smith's own failure to timely file such a request. He cannot avoid the effect of that failure by simply clothing his constitutional claims as independent claims for declaratory relief.

¶45 A case directly on point, although not raising facial constitutional claims, is *Thielking v. Kirschner*, 176 Ariz. 154, 859 P.2d 777 (App. 1993). There, the party received an adverse agency final decision. She filed her ARA complaint for judicial review more than 35 days after the decision. In the same complaint, she asked for declaratory relief and special action relief. The trial court dismissed the entire complaint. *Id.* at

156, 859 P.2d at 779. While this Court reversed the dismissal of the request for judicial review under the ARA because the request was timely, *id.* at 161-62, 859 P.2d at 784-85, it affirmed the dismissal of the declaratory judgment and special action counts of the pleading holding that the plaintiff could not seek to avoid the timeliness requirement by filing those types of claims to circumvent the ARA's jurisdictional requirements:

> We first hold that the trial court correctly dismissed those portions of Thielking's complaint seeking declaratory relief and a writ of mandate (special action). *A party attempting to correct errors in an appealable administrative decision cannot substitute a declaratory relief action for a timely appeal . . . Nor can such a party avoid the requirements of timely appeal by seeking relief in the nature of mandamus or special action.* The issues that Thielking raises in the declaratory judgment and special action portions of her complaint, she also raises in her appeal; and her entire claim must stand or fall on the timeliness of that appeal.

Id. at 156, 859 P.2d at 779 (emphasis supplied) (citations omitted). As noted by the above cases, the same principles apply to facial constitutional challenges to the statute the agency is enforcing as well as claims of procedural due process violations.

¶46 Second, while Smith argues he could have brought his complaint for declaratory relief at any time before or during the Commission proceedings, declaratory relief may not be employed to preempt or prejudge issues committed for initial agency decision and is not appropriate when an adequate appellate remedy exists. *Thielking*, 176 Ariz. at 156, 859 P.2d at 779; *Tanner Co. v. Arizona*

State Land Dep't, 142 Ariz. 183, 187-88, 688 P.2d 1075, 1079-80 (App. 1984).[9] *See also State Personnel Bd.*, 637 P.2d at 335 (court should not interfere with agency proceeding even on constitutional claim, but should await review of final decision). Nor may a claim for declaratory relief be based upon a moot or abstract question, but must be based on a justiciable issue. *Manning v. Reilly*, 2 Ariz. App. 310, 314, 408 P.2d 414, 418 (1965). Accordingly, since Smith was not claiming some particular procedure used by the Commission was violating his constitutional rights and he needed immediate relief, *Polaris Int'l Metals Corp. v. Arizona Corp. Comm'n*, 133 Ariz. 500, 504, 506-07, 652 P.2d 1023, 1027, 1029-30 (1982), his constitutional claims for declaratory relief should have either been brought before the Commission initiated its formal proceedings against Smith or as a timely appeal from the Commission's final decision under the ARA and the Act.

¶47 In his reply brief and at oral argument, Smith implies that it is not logically possible that his claims for declaratory relief were filed both too late and too early. The fact of the matter is they were. A party may request declaratory relief that a statute is unconstitutional when he is threatened with prosecution thereunder. *Planned Parenthood Ctr. of Tucson, Inc. v.*

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[9] Nor may a party who fails to follow the statutory procedures for judicial review of an agency decision seek judicial relief through a special action to the superior court. *Stapert v. Arizona Bd. of Psychologist Exam'r*, 210 Ariz. 177, 182, ¶ 24, 108 P.3d 956, 961 (App. 2005). *Accord Rosenberg v. Arizona Bd. of Regents*, 118 Ariz. 489, 494, 578 P.2d 168, 173 (1978).

Marks, 17 Ariz. App. 308, 312-13, 497 P.2d 534, 538-39 (1972). However, Smith filed his claims for declaratory relief after the Commission had issued the March 25 order, after the administrative law judge had conducted a hearing and issued recommendations, and after the Commission had adopted those findings. At that point, he was not *threatened with* prosecution, he *had been* prosecuted. The rationale for allowing Smith to pursue declaratory relief as to the constitutionality of the Act did not apply; because he had already asked for agency hearings, the Commission had complied with his request and he was exposed to legal sanctions. Once Smith pursued that course, he was precluded from seeking declaratory relief on the alleged facial invalidity of the Act except in a complaint for judicial review for the Commission's final decision. He cannot use a declaratory action as a substitute for judicial review of an agency decision.

¶48 A party who agrees to proceed in an agency decision cannot simply interrupt that decision-making process at any time by filing a complaint for declaratory relief with a court. Rather, once the party goes down the path of agency decision-making, he can only raise his constitutional challenges to the face of the statute or as applied to him after the agency has finished its process. *Wooten*, 254 S.E.2d at 890-91; *City of Atlanta*, 122 S.E.2d at 919-20; *State Personnel Bd.*, 637 P.2d at 335.[10] Here, Smith did not

[10] The only exception to such a requirement is where a specific procedural act of the agency is being challenged on (continued...)

seek declaratory relief before the agency began its proceedings. Nor did he seek such relief in a timely request for judicial review under the ARA and the Act. Rather, he claims he has the right to seek such relief during or after the administrative process in the form of an independent claim for declaratory relief. Such relief is barred both during the process and after except in the form of a timely ARA/Act proceeding.

¶49 The reasons for such limitations on the timing of declaratory relief in this setting is similar to that requiring a party to await the end of the proceedings before seeking judicial review under the ARA or the Act. If a party could bring an independent complaint for declaratory relief on constitutional grounds at any point in the agency proceedings, the ability of agencies to act on alleged wrongful conduct would be stymied by frequent delays in the form of those declaratory judgment actions. *State Personnel Bd.*, 637 P.2d at 335-37.

¶50 Moreover, if an independent action for declaratory relief challenging the constitutionality of the agency's statute could be brought separate from a timely appeal under the ARA and the Act, agency determinations would not be final until the statute of limitations had ended on the declaratory relief. An agency could issue a final administrative order and, after the period for judicial review had ended, consider the matter final. However,

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[10] (...continued)
constitutional grounds. *Supra*, ¶ 46. Smith did not raise such a constitutional challenge here.

under Smith's theory, he could bring an independent claim for declaratory relief challenging the constitutionality of the Act well after the statutorily-required period for judicial review. This would unduly interfere with agency enforcement of the statute as well as make the statutorily-required time for judicial review meaningless. In effect, such a declaratory relief action would be an impermissible collateral attack on the agency determination. *Gilbert v. Bd. of Med. Exam'r*, 155 Ariz. 169, 174-76, 745 P.2d 617, 622-24 (App. 1987) (party to agency proceedings who failed to seek judicial review of decision under ARA cannot bring separate action for damages to collaterally attack the agency's final decision); *Cooper v. Commonwealth Title of Arizona*, 15 Ariz. App. 560, 562-63, 489 P.2d 1262, 1264-65 (1971) (declaratory judgment may not be used to collaterally attack a judgment unless claim is that prior judgment is void for lack of jurisdiction or void on its face); *Schierding*, 705 S.W.2d at 487 (declaratory judgment action raising facial constitutional challenge to statute under which agency is acting would be a collateral attack on agency decision); *Larry Pitt & Associates*, 785 A.2d at 1101 (same).[11]

[11] We recognize that Smith brought his declaratory judgment action in the same pleading as his ARA complaint for judicial review. However, his theory is that such declaratory judgment action was independent of the ARA review and thus not bound by the time requirements to seek judicial review under the Act and the ARA. Accordingly, his theory that he can bring an independent action for declaratory relief is a form of collateral attack on the Commission's final decision.

¶51 The dissent contends that despite the above principles, Smith should have been able to bring an independent action for declaratory relief on the facial constitutionality of the Act because the Commission could not have determined such constitutionality and therefore there was no need for Smith to exhaust administrative remedies. We disagree with the dissent's analysis for several reasons.

¶52 First, the dissent's conclusion conflicts with the holding of *Hurst*. There, the argument was made that the plaintiff should have been able to bring an independent action for declaratory relief from the agency decision based on procedural due process violations during the course of the administrative proceedings. 125 Ariz. at 75, 607 P.2d at 394. The Court rejected that argument and held that the only means of relief was in the form of a timely ARA request for judicial review. *Id.* This result was despite the fact that the school board in that case could not have held that its own procedures violated due process, just as the Commission could not decide the constitutionality of the Act.

¶53 Second, the dissent confuses two concepts – the need for finality and the exhaustion of administrative remedies. While they are related, they are not the same. *Southwestern Paint & Varnish Co. v. Arizona Dept. of Environmental Quality*, 191 Ariz. 40, 42, 951 P.2d 1232, 1234 (App. 1997), *affirmed in part on other grounds*, 194 Ariz. 22, 976 P.2d 872 (1999) (*citing Darby v. Cisneros*, 509 U.S. 137, 144 (1993)). Exhaustion of administrative remedies is an

administrative and judicial rule of procedure by which the injured party can seek a remedy if an agency decision is unlawful. *Darby*, 509 U.S. at 144. In contrast, the finality requirement is aimed at allowing the agency to take a definitive position on an issue that may inflict an actual and concrete injury. *Id.* Thus, the finality requirement is premised both on allowing administrative agencies to make a final decision and avoiding having the courts needlessly interfere with the executive branch's enforcement efforts prior to a final decision on the merits.

¶54 The dissent cites to a number of cases which it contends supports the view that a party can bring a declaratory action challenging the facial constitutionality of a statue independent of a request for judicial review of the agency decision without the need to exhaust administrative remedies. There is a line of cases which supports such a view, at least where the agency proceedings have not begun. However, in most cases once the agency proceedings begin, any claim of facial unconstitutionality should await finality and be brought as part of a timely request for judicial review. As one commentator has explained in his treatise on administrative law, most of the cases focusing on exhaustion and those focusing on the need for finality can be reconciled based on a number of factors, including the injury to the petitioner if exhaustion is required, the degree of difficulty of the constitutional issue, the extent to which judicial resolution of the issue will be aided by agency factfinding or application of expertise and the extent to which the agency has already completed

its proceedings. 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 15.5 (2002) ("Pierce"). As Pierce has noted with approval, other factors to be considered are whether the legislature required agency proceedings and whether the agency might resolve other issues in a manner rendering it unnecessary to resolve constitutional issues. *Id.* at 1007.

¶55 Most of these factors would require finality here. Clearly, once the agency had almost completed its hearings and decision-making, Smith would not be injured by requiring him to complete the agency process. Second, the legislature has required any review of the decision to be through a request for judicial review under the ARA and the Act. Third, a court can offer effective relief under a request for judicial review if it is timely taken. Requiring completion of the process also allows the agency to make decisions which could have rendered the constitutional issues moot. Finally, as we have discussed above, requiring finality and limiting the post-hearing challenge to a request for judicial review avoids interfering with or delaying the agency process.

¶56 At least one case cited by the dissent on the exhaustion issue supports our view that once the agency proceeding has begun, a declaratory relief action challenging the statute's constitutionality on its face cannot be brought until a final administrative decision is rendered. In *Bonacci v. City of Aurora*, 642 P.2d 4 (Colo. 1982), the plaintiff petitioned for retirement

benefits. 642 P.2d at 5. Initially, he would have been entitled to benefits based on the city size after 20 years of service. *Id.* However, after the city grew to a new size, the statute provided he was qualified for benefits only after 25 years of service. *Id.* Without any administrative hearing, the pension board denied his request under the amended law. *Id.* at 6. After the time for any judicial review of the decision passed, the plaintiff filed an independent action for declaratory relief as to his right to have his pension determined under the prior law. *Id.* The court found the plaintiff was not required to consolidate his constitutional claim on the statute with a complaint for judicial review because the pension board's decision was a legislative act, not a quasi-judicial act. *Id.* at 6-7. The court distinguished other cases in which it had held constitutional attacks on agency statutes when a contested case decision had been rendered required those attacks to be brought as a part of a judicial review of the agency's final decision. *Id.* at 7 (*citing Clasper v. Klapper,* 636 P.2d 682 (Colo. 1981) and *Norby v. Boulder*, 577 P.2d 277 (Colo. 1978)).

¶57 The other cases cited by the dissent merely cite the general exception to exhaustion in dicta. Those cases either have nothing to do with an agency enforcement action or contested case proceeding, dealt with what procedure to use at the agency hearing or were taken before or after the agency proceeding. Thus, those cases do not conflict with our view that a declaratory relief action can be filed only before the agency initiated contested case

proceedings or after the proceedings are concluded as a necessary part of the request for judicial review of the agency's final decision. *See Fred Schmid Appliance & Television Co. v. City and County of Denver,* 811 P.2d 31, 33 (Colo. 1991) (taxpayers could file for declaratory relief without exhausting administrative remedies where dispute was whether state or city procedures to challenge tax assessment should be used); *Hudson Valley Oil Heat Council, Inc. v. Town of Warwick*, 777 N.Y.S.2d 157, 159 (App. 2004) (constitutional challenge was to validity of law prior to any enforcement proceedings); *Bruley v. City of Birmingham*, 675 N.W.2d 910, 914 (Mich. App. 2003) (complaint was filed after designation of area as historic district); *Dept. of Highway Safety and Motor Vehicles v. Sarnoff*, 776 So.2d 976, 979-81 (Fla. App. 2001), *approved*, 825 So.2d 351 (Fla. 2002) (appellees not raising facial challenge to statute, but challenging law as applied, must exhaust administrative remedies); *Tindall v. Norman*, 427 N.W.2d 871, 872-73 (Iowa 1988) (challenge was to agency's construction of collection center pursuant to alleged unconstitutional statute; no agency proceeding was at issue); *Kingsley v. Miller*, 388 A.2d 357, 359 (R.I. 1978) (while principle noted in dicta, parties had agreed not to pursue further agency proceedings but to commence declaratory relief action immediately).

¶58 In at least one case, there was not even a declaratory judgment action filed and the issue was whether a party had to file a petition for rehearing before seeking administrative review.

Illinois Health Maintenance Organization Guar. Ass'n v. Shapo, 826 N.E.2d 1135, 1139 (Ill. App. 2005). *Compare Liability Investigative Fund v. Medical Malpractice Joint Underwriting Ass'n of Massachusetts*, 569 N.E.2d 797, 801 (Mass. 1991) (constitutional challenge filed after agency ruling stating what persons or classes of persons would be liable for recoupment, but no administrative enforcement proceedings had been initiated).

¶59 Third, the dissent's conclusion ignores the two principles for not permitting independent requests for declaratory relief either during the course of agency decision-making or after a final decision is made. The first of these principles is justicability of issues. As discussed earlier in this decision, an action for declaratory relief is premised on protecting a person threatened with prosecution under an allegedly unconstitutional statute. Once the process has begun, especially when the person has requested to go through the administrative process, he is no longer threatened with the penalty or prosecution. Similarly, once the process is over, his damage is the loss of his legislative seat. That damage can be rectified by the effective appellate remedy of a timely request for judicial review of the agency decision, not an independent declaratory judgment action (whether asserted in the complaint for judicial review or separately).

¶60 Additionally, permitting an independent action for declaratory relief at any time during or after the administrative process would interfere with the executive enforcement process and

make the legislatively-determined time limitations for judicial review meaningless. Such an action at any time during the administrative process would wreak havoc on the proceeding, especially under the Act where the need for a final decision and relatively quick judicial review is imperative given the possible forfeiture of a legislative seat. Given the separation of powers between the executive branch to enforce the statutes through agency determinations and the judiciary to review those acts only as permitted by the legislature, we should tread lightly before broadly construing our power and jurisdiction to review agency decisions or proceedings except as specifically permitted by the legislature.

¶61 Conversely, permitting such an independent action after the Commission makes its final decision makes the fourteen-day time for review meaningless. Unless the fourteen-day time period could be seen as a statute of limitations, the legislator could simply bring the independent action for declaratory relief well after that time period with the only limitation period being if he also brought a tort or other common-law claim. *Vales v. Kinghill Condominium Assoc.*, 2005 WL 3489240 at *4, ¶ 17 (Ariz. App., Dec. 22, 2005).

¶62 Fourth, the dissent states that Smith presents important constitutional issues. Our own independent research on those issues reflects that they are, at best, slim.[12]

[12] Smith raised a number of challenges to the (continued...)

[12] (...continued)
constitutionality of the Act. First, Smith contended that the Act unconstitutionally adds an additional requirement to become a legislator or to remove a legislator. However, impeachment and recall are not an exhaustive list of means for removal and the legislature may provide for alternate means of removal from elected office. *State ex rel. De Concini v. Sullivan*, 66 Ariz. 348, 355-58, 188 P.2d 592, 596-98 (1948). While Smith contends the holding in *Sullivan* is not a reliable interpretation of the constitution, and urges this Court to hold otherwise, relying on *Holmes v. Osborn*, 57 Ariz. 522, 115 P.2d 775 (1941), *Sullivan* is consistent with *Holmes*. The court in *Sullivan* pointed out that the court in *Holmes* did not state that the legislature was precluded from creating means other than recall and impeachment for removal of officers. *Sullivan*, 66 Ariz. at 354-55, 188 P.2d at 596. As further pointed out in *Sullivan*, the court's discussion of removal of constitutionally elected officials in *Holmes* was dicta. *Holmes*, 57 Ariz. at 534-36, 115 P.3d at 781-82; *Sullivan*, 66 Ariz. at 354-55, 188 P.2d at 596. Similarly, Smith's allegation that the forfeiture penalty is an unconstitutional delegation of legislative power of impeachment to an executive agency and a violation of separation of powers fails because his argument is premised on his assertion that the only means of removal is by impeachment or recall.

Second, Smith alleged in his complaint that the Act unconstitutionally adds an additional eligibility requirement to serve in the Legislature. This argument ignores that compliance with the Act is voluntary, A.R.S. § 16-947(A) (Supp. 2005). Thus, the Act only has an eligibility requirement to obtain funds under the Act, not to serve in the legislature.

Third, Smith alleged that limitations on his campaign expenditures violate the First Amendment to the United States Constitution as well as Article 2, Section 6 of the Arizona Constitution (2001). The State correctly pointed out below, and Smith failed to respond, that voluntary campaign finance schemes that offer public funding in exchange for limits on expenditures in fact promote free speech and are constitutionally sound. *Buckley v. Valeo*, 424 U.S. 1, 57 n.65, 90-96 (1976) *See also Republican National Committee v. Federal Election Comm'n*, 487 F. Supp. 280, 285 (S.D.N.Y. 1980), *judgment affirmed*, 445 U.S. 955 (1980); *Vote Choice, Inc. v. DiStefano,* 4 F.3d 26, 38 (1st Cir. 1993); *Rosenstiel v. Rodrigu7z*, 101 F.3d 1544, 1552-53 (8th Cir. 1996).

Fourth, Smith alleged the monetary penalty under the Act amounted to cruel and unusual punishment under Article 2, Section
(continued...)

Indeed, the State's papers in the superior court addressed a number of those issues on the merits, to which Smith never even responded. We could affirm the dismissal of the declaratory relief count on the merits on any basis presented to the superior court. *In re Estate of Lamparella*, 210 Ariz. 246, 250, ¶ 18, 109 P.3d 959, 963 (App. 2005); *Wertheim v. Pima County*, 211 Ariz. 422, 424, ¶ 10, 122 P.3d 1, 3 (App. 2005).

¶63 In conclusion, the superior court did not err in dismissing Smith's complaint for declaratory relief. Such requested relief had to be made as part of a timely request for judicial review of the Commission's final decision and Smith did not file such a timely request.

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[12] (...continued)
15 of the Arizona Constitution (2001) as well as the Eighth Amendment. Those clauses are limited to criminal proceedings under the federal constitution and we do not interpret our analogous constitutional prohibition any broader. *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983); *State v. Davis*, 206 Ariz. 377, 380-81, ¶ 12, 79 P.3d 64, 67-68 (2003); *Olson v. Walker*, 162 Ariz. 174, 182-83, 781 P.2d 1015, 1023-24 (App. 1989).

Fifth, Smith's claim of selective prosecution is more in the mode of a procedural attack on the Commission's action, not a facial attack on the Act. Accordingly, it had to be brought as a claim in a timely complaint for judicial review of the October 4 order. *Hurst*, 125 Ariz. at 75, 607 P.2d at 394.

Finally, as the State pointed out in the superior court, to which Smith did not reply, Smith is barred from challenging the constitutionality of the Act after agreeing to take funding under the Act. *Climate Control, Inc. v. Hill*, 87 Ariz. 201, 205, 349 P.2d 771, 773 (1960).

VII. Issue Five - The Writ of Quo Warranto

¶64 Smith's final argument is that he was entitled to a jury trial on the State's petition for quo warranto. On the facts of this case, we disagree.

¶65 By statute the Attorney General is authorized to petition the superior court or the supreme court for a writ of quo warranto "against any person who usurps, intrudes into or unlawfully holds or exercises any public office . . . within the state." A.R.S. § 12-2041 (A) (2003). Under the Arizona Constitution, "The right of trial by jury shall remain inviolate." Ariz. Const. art. 2, § 23. More specifically, when "a jury has been demanded, the court may not withdraw the case from the jury's consideration *if there are controverted issues of fact*." *Slonsky v. Hunter*, 17 Ariz. App. 231, 232, 496 P.2d 874, 875 (1972) (emphasis added).

¶66 After the statutory period for judicial review of an agency decision has run without a properly filed appeal having been entered, the decision is considered res judicata, and not subject to collateral attack. *Hurst,* 125 Ariz. at 75, 607 P.2d at 394. "[T]he doctrine of res judicata is that an existing final judgment rendered upon the merits . . . is conclusive as to every point decided therein and also as to every point raised by the record which could have been decided, with respect to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." *Hoff v. City of Mesa*, 86 Ariz. 259, 261, 344 P.2d 1013, 1014 (1959).

¶67 Smith failed to file a timely and proper complaint for judicial review of the Commission's final order. The Commission's decision became res judicata. The State filed the petition for a writ of quo warranto after the Commission's decision became res judicata. At that point, then, the Commission's findings were conclusive as to Smith's obligation to forfeit his office under the Act, and by extension that he unlawfully held office. There was therefore no question of fact with regards to the quo warranto petition, and Smith was not entitled to a jury trial under the Constitution.

¶68 Moreover, we note that in Smith's response to the quo warranto petition, Smith admitted all the relevant facts concerning the Commission's proceedings and final order, although he asserted those decisions were arbitrary and capricious or otherwise invalid. Given that admission and the fact the Commission's final order was now res judicata, there were no disputed facts requiring a jury trial on the quo warranto petition.

¶69 Smith relies upon *State ex rel. Bullard v. Jones*, 15 Ariz. 215, 137 P. 544 (1914) to support his argument that he has the right to a jury trial regarding the quo warranto petition. In that case, the Arizona Supreme Court stated in dicta that it would decline to exercise original jurisdiction when there was concurrent jurisdiction in the superior court (such as for quo warranto petitions) absent exigent circumstances. 15 Ariz. at 223, 137 P. at 547. One of the rationales articulated in support of this

statement was that the superior courts were equipped to entertain a full trial before a jury if necessary. *Id.* at 221-222, 137 P. at 547. The court in that case issued no legal mandate for a jury trial in all quo warranto proceedings, only stated that a jury trial ought to be available if necessary. In this case, a jury was not necessary because there were no questions of fact with regards to the quo warranto proceedings. Therefore, Smith was not unconstitutionally denied the right to a jury trial.

VIII. Conclusion

¶70 Based on this record, Smith has not established that the Arizona Constitution demands these proceedings be stayed pending the completion of the legislative session. As to the merits of his appeal: (1) The Commission could not and did not waive the fourteen day time limit for filing a complaint for judicial review of the Commission's final order; (2) Smith's original complaint, filed while his motion for rehearing or review was pending before the Commission, was jurisdictionally defective as defined by statute and therefore the complaint cannot be considered an actionable premature appeal. Smith's failure to file a timely complaint for judicial review of the Commission's final order resulted in the Commission's final order becoming res judicata and therefore not subject to collateral attack; (3) Smith's special action complaint for declaratory relief is not actionable because, at the time the original complaint was filed, the claims were not justiciable. Once they were justiciable, Smith had an adequate remedy through a timely complaint for judicial review, which he failed to file; and

(4) Once the Commission's order was res judicata as of the filing of the quo warranto petition, there were no questions of fact and therefore Smith was not entitled to a jury trial on the petition.

¶71 As a result, the superior court did not err as alleged in dismissing Smith's complaints and granting the State's quo warranto petition. Accordingly, we affirm the superior court's Judgment.

¶72 Our stay of the Judgment will remain in effect until five judicial days after entry of this memorandum decision. The stay will dissolve automatically without further order of this Court unless the Arizona Supreme Court issues a further stay.

_____
DONN KESSLER, Presiding Judge

CONCURRING:

_____
MAURICE PORTLEY, Judge

G E M M I L L, Judge, Concurring in part and Dissenting in part:

¶73 I concur with the conclusion of the Majority that Smith is not, on this record, entitled to a stay of these proceedings on the basis of the legislator's constitutional privilege to be free from civil process during the legislative session, although I do not join the entirety of their analysis. I also concur in the Majority's resolution of Smith's demand for a jury trial on the State's petition for a writ of *quo warranto*.

¶74 I respectfully dissent for two primary reasons. First, I conclude that Smith timely and effectively sought judicial review of the merits of the administrative decision of the Citizens Clean Elections Commission. Second, even if his attempts to obtain judicial review were untimely, Smith should be allowed an opportunity to litigate his claims that portions of the Act are facially unconstitutional.

Timeliness of Seeking Judicial Review

¶75 The Majority concludes, and I agree, that the final administrative decision was the Commission's order of October 4, 2005 and that the 14-day period of time in which to seek judicial review set forth in A.R.S. § 16-957(B) is applicable to displace the 35-day period specified in A.R.S. § 12-904(A). Unlike the Majority, however, I conclude that Smith's original complaint seeking judicial review, filed in superior court eight days prematurely on September 26, 2005, should be considered a timely and effective request for judicial review of the Commission's actions, including its final order of October 4, 2005. The complaint was timely because it was filed before the deadline of October 18, 2005, and it was effective because, although premature and dismissible during during the eight-day period, it matured upon the issuance of the Commission's October 4 order.

¶76 In his original complaint, Smith specifically requested judicial review of the March 25, 2005 order of the Commission, the August 22, 2005 decision of the ALJ, and "all other administrative decisions made or entered in support" thereof. The August 25, 2005

and October 4, 2005 Commission orders are encompassed within this language,[13] and it is abundantly clear from this comprehensive complaint[14] that Smith was seeking judicial review from the adverse rulings of the Commission.

¶77 The Majority engages in what I respectfully submit is a hypertechnical analysis, reaching the conclusion that the premature complaint was a "nullity" that did not ripen into an effective request for judicial review after the Commission's October 4 order. Smith was required to file his complaint for judicial review within 14 days of October 4. He argues that his complaint filed prematurely on September 26 was timely because it was filed before

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[13] The State contends that, because Smith's September 26 complaint does not make express reference to the August 25 and October 4 Commission orders, the complaint is defective. But our supreme court has held that a notice of appeal that referred to the unsigned minute entry rather than the subsequent formal judgment was adequate to initiate an appeal from the judgment, explaining:

> (W)hen adequate notice to appeal has been given to the other party, *no mere technical error* should prevent the appellate court from reaching the merits of the appeal. . . . There is no evidence in the record that the incorrect date misled or prejudiced appellees.

Hanen v. Willis, 102 Ariz. 6, 9, 423 P.2d 95, 98 (1967) (emphasis added). There is no basis to conclude that the State or Commission has been misled or prejudiced because Smith's original complaint mentions only the March 25 order and the August 22 ALJ decision and "all other administrative decisions made or entered in support" thereof. The "bottom line" of the final order of October 4 was exactly the same as the "bottom line" of the March 25 order.

[14] This 44-page complaint includes 263 paragraphs alleging numerous facts and asserting various infirmities in the Commission's and the ALJ's findings and conclusions.

the last available day, October 18, 2005. On this record I agree with Smith for the following reasons.

¶78 First, our analysis should be guided by a preference to find jurisdiction and resolve legal disputes on the merits. "Arizona courts disfavor hypertechnical arguments that needlessly deprive litigants of the right to an appeal." *Guinn v. Schweitzer,* 190 Ariz. 116, 119, 945 P.2d 837, 840 (App. 1997) (citing *McKillip v. Smitty's Super Valu, Inc.,* 190 Ariz. 61, 63-64, 945 P.2d 372, 374-375 (App. 1997)). In this court, just as in the trial court, our objective "is to dispose of cases on the merits, irrespective of technical, harmless errors." *Hanen,* 102 Ariz. at 9, 423 P.2d at 98 (quoting *Ariz. Corp. Comm'n v. Pac. Motor Trucking Co.,* 83 Ariz. 135, 138, 317 P.2d 562, 565 (1957) (Windes, J., joined by Struckmeyer, J., dissenting)). Accordingly, Arizona appellate courts have a "longstanding pro-jurisdiction policy." *Performance Funding, LLC v. Barcon Corp.*, 197 Ariz. 286, 289, ¶ 11, 3 P.3d 1206, 1209 (App. 2000) (citing *Guinn* and *Hill v. City of Phoenix,* 193 Ariz. 570, 975 P.2d 700 (1999)).

¶79 The Majority has decided that the premature complaint was a nullity and could not ripen into an effective request for judicial review. I agree that the complaint was premature and subject to dismissal on that basis prior to October 4, but it was not dismissed at that time. Although a complaint seeking judicial review is in the nature of an appeal, it nonetheless remains a

complaint that initiates an action in superior court.[15] The fact that the judicial review portion of the complaint was dismissible during its prematurity does not render it a nullity. After the final Commission order on October 4, the previously premature and dismissible complaint ripened into an effective and timely request by Smith for judicial review.

¶80 Although there is no Arizona opinion directly on point, there are three Arizona cases primarily cited by the parties and the Majority on this issue: *Barassi v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (1981); *Baumann v. Tuton*, 180 Ariz. 370, 884 P.2d 256 (App. 1994); and *Performance Funding*. These cases each involve notices of appeal filed in a pending action in superior court rather than a new complaint for judicial review of administrative action as in this case. But I submit that these three cases, upon careful analysis, provide strong support for the conclusion that Smith's premature complaint for judicial review became effective on October 4.

¶81 A significant common thread running through *Barassi*, *Baumann*, and *Performance Funding* is that the appellate decision in all three cases resulted in a resolution on the merits. Achieving the same result here would be consistent with these cases and avoids depriving a litigant of an appeal on a mere technical error.

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[15] This is especially so here, because this particular complaint included a request for declaratory relief in addition to seeking judicial review.

And, contrary to the assertion of the Majority, such a resolution does no violence to the language of any statute.

¶82 In *Barassi*, our supreme court held that not all premature appeals must be automatically dismissed. A premature notice of appeal, filed after a dispositive order of the superior court but prior to entry of formal judgment, will become an effective notice of appeal after entry of formal judgment, especially if there has been no prejudice to the appellee. 130 Ariz. at 422, 636 P.2d at 1204. The court recognized that to dismiss the appeal in that case would "punish the appellant for being too diligent." *Id*. at 421, 636 P.2d at 1203. The court found it important that "the appellant displayed an intent to appeal" and "the appellees were not prejudiced by this excess of diligence." *Id*. Similarly, Smith displayed an obvious intent to seek judicial review, and the Commission would not be prejudiced in any applicable sense by allowing Smith's appeal to proceed on its merits.

¶83 In *Baumann*, the trial court granted defendant's motion to dismiss, and plaintiff filed a motion for new trial. Formal judgment was entered and plaintiff filed a notice of appeal, but the motion for new trial remained pending. Defendant filed a motion in this court to dismiss the appeal, and, after plaintiff indicated he did not object, this court dismissed the appeal. Then the trial court granted plaintiff's motion for new trial and vacated the judgment. Defendant then appealed to this court, arguing that by filing the notice of appeal, the plaintiff had abandoned his motion for new trial and the trial court should not

have granted it. This court decided that the premature notice of appeal, filed during the pendency of the motion for new trial and dismissed with plaintiff's consent, was a "nullity" that did not transfer jurisdiction from the trial court to this court and did not constitute an abandonment of the pending motion for new trial. *Baumann*, 180 Ariz. at 371-72, 884 P.2d at 257-58.

¶84 Similarly, Smith's premature complaint did not constitute an abandonment by Smith of his motion for rehearing, nor did it divest the Commission of jurisdiction to complete its consideration of his motion for rehearing and issue its October 4 order denying rehearing, nor did it initially create jurisdiction in the superior court to conduct a judicial review of the administrative proceedings. Unlike the notice of appeal in *Baumann*, however, Smith's premature complaint - even though dismissible while premature - was not dismissed at that time. It remained viable and ceased to be premature when the Commission issued its final order on October 4. At that moment the complaint served to initiate judicial review of the administrative proceedings and orders and to vest full jurisdiction for that purpose in the superior court.

¶85 Because *Baumann* is the only Arizona case upon which the Majority bases its conclusion that Smith's September 26 complaint for judicial review was a "nullity," it should be noted that significant differences exist between the premature notice of appeal in *Baumann* and the premature complaint here. First, as already discussed, there is a difference between a notice of appeal in a pending action and a complaint that initiates a new action in

superior court. A complaint, even if dismissible, is not a nullity, at least not until it is dismissed. Second, the premature notice of appeal declared a "nullity" in *Baumann* had been voluntarily withdrawn and dismissed well before this court was called upon to characterize it. *See Performance Funding*, 197 Ariz. at 288-89, ¶¶ 9-10, 3 P.3d at 1208-09 (describing plaintiff's appeal in *Baumann* as having been voluntarily dismissed and withdrawn). In contrast, Smith did not withdraw his complaint. Third, there was simply no issue in *Baumann* of whether the premature notice of appeal might have ripened into an effective notice of appeal.

¶86 In *Performance Funding*, the trial court entered judgment and appellee filed a time-extending Rule 59 motion to amend the judgment. The appellants' notice of appeal was filed during the pendency of appellee's Rule 59 motion, and the notice of appeal was therefore premature. After the trial court resolved appellee's pending motion, the judgment became final. Appellant did not file a new notice of appeal, and appellee eventually moved to dismiss the appeal on the basis that the premature notice of appeal was a nullity, citing *Baumann*. This court first noted the strong policy of deciding cases on the merits rather than on "technical errors." *Id.* at 288, ¶ 5, 3 P.3d at 1208. The court then noted that appellee's time-extending motion was no longer pending and that the trial court, as in *Barassi*, had entered its final judgment shortly after appellants had filed their premature notice of appeal. *Id.*

at ¶ 8. The court also observed that the premature notice of appeal declared a "nullity" in *Baumann* had been voluntarily withdrawn. *Id*. at 288-89, ¶¶ 9-10, 3 P.3d 1208-09. Finally, the court determined that the premature notice of appeal in *Performance Funding* was not a nullity but instead became effective to trigger an appeal after resolution of the pending motion and entry of final judgment. *Id*. at ¶¶ 9-12.

¶87 In both *Barassi* and *Performance Funding*, the premature notices of appeal did not divest the superior court of jurisdiction, and these notices of appeal matured or ripened into effective and timely notices of appeal upon entry of final judgment in *Barassi* and upon resolution of the pending motion in *Performance Funding*. No further notices of appeal were needed. The same principles should be applied to Smith's efforts to seek judicial review of the Commission's decisions. His complaint was only eight days premature. His intent to appeal was clear. No legal prejudice to the Commission has been shown. His premature complaint in superior court was not dismissed, and it became an effective complaint for judicial review after the Commmission's October 4 order.

¶88 The Majority bases its conclusion in part on the following sentence from *Barassi*:

> It should be noted that the Arizona Appellate Courts will dismiss for lack of jurisdiction the case where a litigant attempts to appeal where a motion is *still pending* in the trial court or where there is no final judgment.

130 Ariz. at 422, 636 P.2d at 1204. This statement is neither controlling nor applicable. To begin with, this court has already recognized this specific language to be dicta and therefore not controlling. *See Performance Funding*, 197 Ariz. at 288, ¶¶ 7-8, 3 P.3d at 1205. But, more importantly, the statement is not applicable for two reasons. First, *Barassi* involved a notice of appeal from trial court proceedings. A premature notice of appeal may in some circumstances be a nullity, but a premature complaint for judicial review is not a nullity. And second, the literal meaning of the above sentence from *Barassi* is consistent with the analysis in this Dissent: Smith's complaint was dismissible for eight days, but it was not dismissed, and by October 4 a final order had been issued and there was no motion pending. Accordingly, as of October 4, there was no longer any basis *even applying this sentence from Barassi* for dismissal of the complaint.[16]

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[16] The Majority also cites *Navajo Nation v. MacDonald*, 180 Ariz. 539, 885 P.2d 1104 (App. 1994) in support of its conclusion that a premature notice of appeal filed during the pendency of a post-trial motion is a nullity that cannot ripen into an effective notice of appeal. But *Navajo Nation* is distinguishable. In *Navajo Nation*, appellant MacDonald, Jr. filed a notice of appeal from an adverse judgment, and then filed a Rule 60 motion for relief from the judgment. After the trial court denied his Rule 60 motion, MacDonald, Jr. did not file a new notice of appeal. This court exercised appellate jurisdiction over the issues presented by MacDonald, Jr. in his notice of appeal, but declined to consider MacDonald, Jr.'s argument on appeal that the trial court should have granted his Rule 60 motion, explaining:

> The Tribe argues that we do not have jurisdiction to consider this issue because it was not contained in MacDonald, Jr.'s notice

(continued...)

¶89 The Majority decision suggests that adopting the approach of this Dissent would be contrary to the statutes establishing judicial review of administrative decisions and would be engrafting a judicial exception to the plain meaning of the statutes. Not so. Giving effect to a previously-filed complaint for judicial review upon the Commission's disposition of the motion for rehearing does not extend, stretch, or bend the time limits imposed on our jurisdiction. The deadline of October 18, i.e., 14 days after October 4, remains jurisdictional, and Smith complied. There was no intrusion into the functions of the executive branch because the premature complaint for judicial review did not transfer or vest jurisdiction in the superior court until after the Commission's October 4 order. After the October 4 order, Smith's complaint for judicial review was no longer premature; it sought judicial review of a final order; and it was effective well before the October 18 deadline. Full compliance with the statutory framework was achieved.

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[16] (...continued)
of appeal. We agree with the Tribe.

Id. at 547, 885 P.2d at 1112. In contrast to Smith's complaint seeking judicial review, MacDonald, Jr.'s notice of appeal did not encompass the trial court's denial of his post-trial motion. And, perhaps more significantly, the court in *Navajo Nation* does not consider the issues of whether and under what circumstances a premature notice of appeal may ripen into an effective one. In fact, it does not appear that such an argument was made. *Navajo Nation*, therefore, sheds no light on whether Smith's complaint became effective after October 4 to initiate judicial review.

¶90 The Majority also emphasizes that there was no "substantively appealable" order when Smith filed his complaint on September 26. While it is technically accurate to say that the August 25 Commission order was not yet "final" on September 26 because Smith's motion for rehearing was pending, the more important point is that this lack of finality was resolved by the Commission's October 4 order, which was substantively appealable. In *Performance Funding*, the notice of appeal was prematurely filed while a time-extending motion was pending, and this court concluded that, once the pending motion was resolved, the notice of appeal became effective. And even though the pending motion in *Performance Funding* was filed by the appellee, rather than by the appellants, this distinction does not outweigh the principles applied in *Barassi* and *Performance Funding* that favor resolutions on the merits over hypertechnical analyses leading to unnecessary dismissals.[17]

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[17] In 1979, the federal courts accomplished by a rule change what our supreme court did in *Barassi*: allowing a losing party to appeal as soon as the district court announces a disposition that, if properly memorialized in a judgment, would be appealable. *See Otis v. City of Chicago*, 29 F.3d 1159, 1166-67 (7th Cir. 1994). The *Otis* court explained the additional effect of a 1993 amendment:

> Similarly, the 1993 amendment . . . permits a party to appeal while a motion for reconsideration (or other motion suspending the finality of the judgment) is pending. The appeal takes effect once the disposition of the motion makes the decision "final." This amendment was designed to avoid a trap that caused appeals filed before the disposition of a motion for reconsideration to self-destruct

(continued...)

¶91 For these reasons, I would reverse the trial court's judgment and remand to allow judicial review of the Commission's decisions.

Facial Constitutional Challenges

¶92 Even if Smith has, as the State contends and the Majority concludes, lost his opportunity for judicial review of the administrative decisions of the Commission, he should still be entitled to litigate whether pertinent portions of the Act are facially unconstitutional and invalid.

¶93 Smith filed a complaint on September 26, 2005, seeking both declaratory relief and judicial review of administrative decisions. Included within the declaratory relief sought by Smith were declarations that portions of the Act are unconstitutional. In addition, the State in October 2005 filed an action against Smith in the superior court, seeking to oust him from his position as a legislator. Smith opposed the State's action by asserting,

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[17] (...continued)
and thereby cost many parties, who were not keenly aware of the niceties of appellate practice, any opportunity for review.

Id. at 1166. The endorsement of such an approach in Arizona, by common law as in *Barassi* or by rule change as in the federal system, would be fair, just, and appropriate. *Cf. Kim v. Comptroller of Treasury*, 714 A.2d 176, 180 (Md. 1998) ("In a case such as this, where a petition for judicial review is filed prematurely because the agency action is not yet final, but where there is final agency action before any proceedings are undertaken in the circuit court, it is improper to dismiss the petition as premature."); *Knapp v. Mo. Local Gov't Employees Ret. Sys.*, 738 S.W.2d 903, 909 (Mo. Ct. App. 1987) ("A petition for review prematurely filed should be treated as filed immediately after the issuance of the agency decision.").

among other arguments, that portions of the Act are unconstitutional.

¶94 After the two actions were consolidated, the superior court ruled against Smith and in favor of the State, dismissed Smith's action, and granted the relief sought by the State. The court's ruling was apparently based on the conclusion that Smith had not timely and effectively sought administrative review of the Commission's October 4 order.[18] As a result, Smith has not yet had an opportunity to litigate the merits of his constitutional challenges. The Majority has decided that because Smith's efforts to obtain judicial review were untimely, he has lost not only the opportunity for judicial review of the Commission's decisions but also any opportunity for constitutional challenges that could not have been considered by the Commission.

¶95 This conclusion of the Majority may be correct with respect to issues of constitutional application that are factually intertwined with the administrative fact-finding process. But I submit that it is incorrect, unjustified, and unfair to deprive Smith of the right to litigate the facial validity of statutory provisions that authorize the administrative action taken against him. For example, he should be entitled to a determination on the

[18] Although the trial court did not explain the reasons for its ruling, the State's motions to dismiss Smith's complaints were based on untimeliness and the most logical conclusion from this record is that the court's ruling was based on the arguments made by the State. At oral argument before this court on January 9, 2006, counsel for the State agreed that the trial court presumably ruled on the basis of untimeliness.

merits whether A.R.S. § 16-942(C), purporting to require forfeiture of office for certain violations of the Act, is constitutional on its face.

¶96 The record is clear that Smith asserted his constitutional challenges to portions of the Act in the proceedings before the Commission and the ALJ, but the Commission and ALJ disavowed any jurisdiction to resolve constitutional issues and therefore did not consider them. The State in its answering brief agrees that the Commission and ALJ could not resolve constitutional issues. It appears undisputed, at least as to any questions of facial constitutional validity, that the Commission and ALJ could not address such issues. Because constitutional issues were not part of the administrative decisions, Smith logically argues that such issues do not necessarily have to be included in judicial review of the administrative decisions and should be allowed to proceed separately from his request for judicial review, especially under the specific circumstances of these proceedings.

¶97 The Majority, however, essentially concludes that Smith did not successfully exhaust his administrative remedies and cannot assert his constitutional challenges except through judicial review of the administrative decisions. I disagree for several reasons.

¶98 Smith did exhaust his administrative remedies. After the March 25 Commission order, Smith sought administrative review and an evidentiary hearing. After the ALJ's August 22 decision and the Commission's August 25 order, Smith moved for rehearing. These were his administrative remedies and he exhausted them. The

administrative proceedings were completed, and a final order was entered on October 4. Smith also attempted to obtain judicial review of the Commission's decisions. Judicial review is a judicial remedy, not an administrative remedy. To the extent that the Majority relies upon cases requiring exhaustion of administrative remedies before facial constitutional claims may be presented, Smith has satisfied any reasonable exhaustion requirement.

¶99 While the State has persuaded the Majority that Smith's original complaint was eight days too early and his amended complaint was 10 days too late to trigger judicial review of the Commission's decisions, there has been no persuasive reason given why it is inappropriate to consider Smith's facial constitutional challenges in these consolidated actions. Even if the September 26 complaint is ineffective to trigger ordinary judicial review, it is surely a timely tendering to the court of Smith's facial constitutional challenges.

¶100 There is no case in Arizona directly on point, determining whether a person who exhausts his administrative remedies and then seeks judicial review of administrative action but misses the deadline may nonetheless assert facial constitutional challenges to the pertinent statutes. No facial constitutional challenges were asserted in such cases as *Thielking v. Kirschner*, 176 Ariz. 154, 859 P.2d 777 (App. 1993), *Hurst v. Bisbee Unified School District*, 125 Ariz. 72, 607 P.2d 391 (App.

1979), and *Arizona Board of Regents v. Harper*, 108 Ariz. 223, 495 P.2d 453 (1972).

¶101 *Bonacci v. City of Aurora*, 642 P.2d 4 (Colo. 1982), is closely on point and instructive. Bonacci participated in administrative proceedings and received an adverse decision. He failed to timely seek judicial review and instead filed a declaratory judgment action nearly four months later, seeking a determination that the administrative action was based on an unconstitutional statute. The trial court dismissed the action and the Colorado Court of Appeals affirmed, concluding that judicial review was the proper and exclusive remedy. *Id.* at 5-6. The Colorado Supreme Court reversed. The court pointed out that Bonacci, in his complaint for declaratory judgment, was seeking a legal determination whether the City could constitutionally amend its ordinance to change the retirement pension eligibility requirements for firemen who had become substantially vested under the ordinance that was in effect at the time they were hired and during the greater part of their service. *Id.* at 7. Because the constitutional challenge related to the validity of the statute, not the details of board action based on the challenged statute, the court held that the ordinary procedures for obtaining judicial review of administrative decisions were not applicable. *Id.* The 30-day time limit for ordinary judicial review did not apply, and Bonacci was entitled to proceed with his constitutional challenge

via the declaratory judgment action. *Id.* The same reasoning should be applied here.

¶102 Many courts recognize that facial constitutional challenges may be asserted even if administrative remedies have not been exhausted. For example, the Iowa Supreme Court has held:

> In order for the exhaustion doctrine to apply, however, an adequate administrative remedy must exist which was intended to be exclusive. Here, the plaintiff challenges the facial constitutional validity of the statute under which the defendant was proceeding. We have said that, because agencies cannot decide issues of statutory validity, administrative remedies are inadequate within the meaning of section 17A.19(1) when such a statutory challenge is made. Accordingly, the exhaustion doctrine does not bar plaintiff's action.

Tindal v. Norman, 427 N.W.2d 871, 872-73 (Iowa 1988) (citations omitted).

¶103 Similarly, the Colorado Supreme Court, citing its earlier *Bonacci* opinion, has explained:

> We have also held that a party is not required to exhaust its administrative remedies when the administrative agency does not have the "authority to pass on the question raised by the party seeking judicial action." Because an administrative agency cannot pass upon the constitutionality of the legislation under which it acts, a party seeking review of the constitutionality of an agency's enabling legislation need not exhaust its administrative remedies. *See Bonacci v. City of Aurora*, 642 P.2d 4, 7 (Colo. 1982) (declaratory relief proper when petitioner challenged constitutionality of amendment to city ordinance, not the action of the agency).

Fred Schmid Appliance & Television Co. v. City and County of Denver, 811 P.2d 31, 33 (Colo. 1991) (citations and footnote omitted).

¶104 Additional cases support the availability of constitutional relief even if the person has failed to exhaust administrative remedies. *See State, Dept. of Highway Safety v. Sarnoff*, 776 So.2d 976, 978 (Fla. Dist. Ct. App. 2000) (clarifying that a taxpayer need not exhaust administrative remedies when challenging the constitutionality of a statute on its face), *aff'd*, 825 So.2d 351 (Fla. 2002); *Ill. Health Maint. Org. Guar. Ass'n v. Shapo*, 826 N.E.2d 1135, 1143 (Ill. App. Ct. 2005) (indicating that aggrieved parties may seek judicial review of administrative decisions without exhausting administrative remedies when a statute, ordinance, or rule is attacked as unconstitutional on its face); *Liab. Investigative Fund Effort v. Med. Malpractice Joint Underwriting Ass'n of Mass.*, 569 N.E.2d 797, 805-06 (Mass. 1991) (stating that exhaustion of administrative remedies is not required for a facial challenge to the constitutionality of an agency's enabling statute or for a challenge to the statute as applied to the party when the issue does not depend upon factual determinations within the agency's expertise); *Bruley v. City of Birmingham*, 675 N.W.2d 910, 915-16 (Mich. Ct. App. 2003) ("The trial court's ruling granting the city summary disposition was based on the conclusion that Bruley's claims were not ripe because she failed to exhaust her administrative remedies. To the extent

this ruling applied to Bruley's facial constitutional challenge, we conclude that it was erroneous."); *Hudson Valley Oil Heat Council, Inc. v. Town of Warwick*, 777 N.Y.S.2d 157, 159 (N.Y. App. Div. 2004) ("[S]ince the plaintiffs challenge the validity and constitutionality of the Town's local laws on their face, it is not necessary that they first exhaust their administrative remedies by seeking a variance."); *Kingsley v. Miller,* 388 A.2d 357 (R.I. 1978) (reiterating that even if petitioner has not exhausted all administrative remedies, declaratory judgment is appropriate if the complaint alleges that an ordinance is facially unconstitutional).

¶105 The Majority offers some good reasons why, in different circumstances, it could be helpful if constitutional questions are included in the judicial review process rather than, as here, in Smith's response to the State's petition to oust him from office and Smith's request for declaratory relief. Courts prefer not to address constitutional issues if relief may be granted on a non-constitutional basis. Some courts also prefer that a person not seek constitutional relief during an ongoing administrative proceeding to avoid potentially unnecessary consumption of judicial and administrative resources. And, to the extent that a party is attempting merely to correct errors in an appealable administrative decision, courts generally do not allow a declaratory relief action to be a substitute for timely judicial review. But Smith's position and the foundational facts here are different.

¶106 Smith's challenges to the facial constitutional validity of portions of the Act are entirely proper subjects for declaratory

relief under these circumstances and should be allowed to proceed. His challenges may also present complete defenses to part or all of the relief sought by the State in the action it initiated against Smith, and these challenges should not be discarded on the basis that Smith's complaint for judicial review was untimely.

¶107 This litigation presents important constitutional issues. Even if Smith has lost his chance for judicial review of the administrative decisions of the Commission, we should not conclude that he has lost his right to litigate the facial validity of the pertinent statutes.

Conclusion

¶108 I agree with the Majority's conclusions that the legislator's constitutional privilege does not apply on this record and that Smith is not entitled to a jury trial on the State's petition for writ of *quo warranto* unless there are genuine issues of fact to be decided. Because I conclude that Smith timely and effectively sought judicial review of the merits of the administrative decision of the Commission, however, I would reverse and remand to allow judicial review to proceed. Alternatively, because Smith should be allowed to challenge the facial unconstitutionality of portions of the Act, I would reverse and remand for this purpose.

JOHN C. GEMMILL, Judge